IN THE

Supreme Court of the United States

October Term, 1962.

NO. 27

BURLINGTON TRUCK LINES, INC., ET AL., *Appellants*,
vs.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NEBRASKA SHORT LINE CARRIERS, INC., *Appellees*.

NO. 28

GENERAL DRIVERS AND HELPERS UNION, LOCAL 554, Affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *Appellant*,
vs.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NEBRASKA SHORT LINE CARRIERS, INC., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIEF OF APPELLEE, NEBRASKA SHORT LINE CARRIERS, INC.

Certificate of Service Appended at Page 30

ROBERT A. NELSON
J. MAX HARDING
DUANE W. ACKLIE
RICHARD A. PETERSON
Box 2028
Lincoln, Nebraska
Counsel for Nebraska Short Line Carriers, Inc., Appellee

GANT PUBLISHING CO., Lincoln, Nebraska

INDEX

Subject Index

Page

Cases Cited

Statutes Cited

IN THE

Supreme Court of the United States

October Term, 1962.

NO. 27

BURLINGTON TRUCK LINES, INC., ET AL., *Appellants*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NEBRASKA SHORT LINE CARRIERS, INC., *Appellees*.

NO. 28

GENERAL DRIVERS AND HELPERS UNION, LOCAL 554, Affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *Appellant*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NEBRASKA SHORT LINE CARRIERS, INC., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIEF OF APPELLEE, NEBRASKA SHORT LINE CARRIERS, INC.

STATUTES INVOLVED

The sole issue presented to this Court involves only a determination of the power of the Interstate Commerce Commission under the provisions of Section 207 (a) of the

Interstate Commerce Act (49 U. S. C. 307 (a)).*

QUESTION PRESENTED

This appeal from the judgment of a three-judge Federal District Court, dismissing an action brought to set aside an Order of the Interstate Commerce Commission, involves only the question of whether the Commission acted within the scope of its statutory authority in authorizing the operations of an additional motor carrier, in order to alleviate a situation in which a substantial portion of the shipping public in the State of Nebraska had been regularly denied the benefits of adequate motor transportation service due to the repeated and prolonged failure of the existing carriers to render the service collectively authorized by their certificates.

STATEMENT

Appellee, Nebraska Short Line Carriers, Inc., adopts the statement contained in the brief of the Interstate Commerce Commission, and the same is incorporated herein by reference.

SUMMARY OF ARGUMENT

1. The Interstate Commerce Commission is required, by virtue of Section 207 (a) of the Interstate Commerce Act, to authorize additional motor carrier operations when required by the public convenience and necessity. The extent of this obligation is manifested in the wide range of discretion permitted the Commission by this Court in resolving the particular transportation problems which present themselves to that body. The decision of the Commission on review here is entirely within the bounds of that

---

* Reprinted in Appendix A

discretion and is wholly consistent with the Commission's obligation to the general public as well as to the transportation industry.

The decision to authorize additional motor carrier operations was made in light of extensive evidence of service failures in the form of delays, misroutings, unnecessary expense, and outright refusals to render service. These service failures, occasioned by the willful failure of existing carriers to live up to their obligations of nondiscriminatory public service, continued up to and through the hearings in this matter.

In rendering its decision the Commission considered that not all of the existing carriers failed, at all times, to render the service which they were holding themselves out to offer. On the other hand the Commission also recognized that all existing carriers had, to a greater or lessor extent, failed to meet the reasonable transportation requirements of a large portion of the Nebraska shipping public. In light of these facts the Commission determined that the authorization of additional carrier service was necessary to provide reasonably adequate motor transportation service to the involved area. This was a determination which the Commission was both empowered and required to make and no sufficient basis for its reversal has been shown.

2. As holders of a certificate authorizing service in the public interest, common carriers have an obligation, both at common law and under the Interstate Commerce Act, to provide the service which they hold themselves out to render to all who seek to use it. No sufficient justification for the service failures, so very much in evidence here, has been shown. In such a situation the shipping public is entitled to the services of a carrier pledged to

overcome these service failures and organized for that purpose. Nothing in the Interstate Commerce Act requires that the public exhaust all possible remedies before turning to the certificating provisions to obtain relief. The applicant in this proceeding has met its burden under Section 207 (a) of the Act and is therefore entitled to the relief afforded by that section.

ARGUMENT

I.

Where a substantial portion of the shipping public has regularly been denied the benefit of adequate transportation service due to abandonment by existing carriers of their statutory and common law service obligations, the commission is required, upon request, to authorize additional motor carrier operations.

In virtually every proceeding under Section 207 (a) of the Interstate Commerce Act (49 U. S. C. 307 (a)), the basis for the application is the fact that the existing carriers, for one reason or another, are not providing the service which the applicant proposes to offer. The inadequacy of the existing service is demonstrated in countless ways, from failure to provide the particular type of service required to lack of the authority necessary to move the commodities in question.

This particular proceeding differs from the normal application only in that here the inadequacy of the existing service which is manifested in the numerous delays, misroutings, and failure to provide service upon request which are so extensively catalogued in the record (R. 29-51), was the result of a refusal by the existing carriers to maintain normal interline relationships with the non-union short-line carriers in the State of Nebraska along with

direct refusals to serve certain shippers and receivers (R. 104).

As far as the shipping public is concerned, the reasons for inadequate service are immaterial. What is material is the fact that a large segment of the commercial life in the State of Nebraska is absolutely dependent upon adequate motor transportation service, a service which the Commission found to be lacking.

(A) Function of the Commission

The Commission is charged with the duty of authorizing motor carrier operations when required by the present and future public convenience and necessity. Section 207 (a) of the Interstate Commerce Act, 49 U. S. C. 307 (a), which governs this proceeding, provides in part:

> "* * * a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the * * * proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

Congress has not seen fit to describe the scope of the term, "public convenience and necessity." In any given proceeding, therefore, it is incumbent upon the Commission to determine whether the issuance of a certificate will be consistent with this statutory test. At the very least the broad wording of the statute gives the Commission the power to consider the particular circumstances of the pending application and, based upon those circumstances, use its expertise to evaluate and solve the particular problem with which it is faced.

In *Interstate Commerce Commission v. Parker*, 326 U. S. 60, 65, this Court affirmed a grant of authority to a rail affiliate. The Court pointed out:

> "Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from a half-century experience of government in the regulation of transportation. When Congress in 1935 amended the Interstate Commerce Act by adding the Motor Carrier Act, it chose the same words to state the condition for new motor lines which had been employed for similar purposes for railroads in the same act since the Transportation Act of 1920, § 402, (18) and (20), 41 Stat. 477. Such use indicated a continuation of the administrative and judicial interpretation of the language. Cf. Case v. Los Angeles Lumber Co., 308 U. S. 106, 115. The Commission had assumed, as its duty under these earlier subsections, the findings of facts and the exercise of its judgment to determine public convenience and necessity. This Court approved this construction. Chesapeake & Ohio R. Co. v. United States, 283 U. S. 35, 42. Cf. Gray v. Powell, 314 U. S. 402, 411-12. The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. Cf. Powell v. United States, 300 U. S. 276, 287. This, of course, gives administrative discretion to the Commission, Cf. McLean Trucking Co. v. United States, 321 U. S. 67, 87-88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances * * *."

The function of the Commission in this regard was further defined by this Court in *United States v. Detroit Navigation Co.*, 326 U. S. 236, 241, a case involving the grant of water carrier rights based upon a future need for the service, when it stated:

> "* * * The Commission is the guardian of the public interest in determining whether certificates of con-

venience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. Interstate Commerce Commission v. Parker, 326 U. S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. See Chesapeake & Ohio R. Co. v. United States, 283 U. S. 35, 42; Alton R. Co. v. United States, 315 U. S. 15, 23. Forecasts as to the future are necessary to the decision. But neither uncertainties as to the future nor the inability or failure of existing carriers to show the sufficiency of their plans to meet future traffic demands need paralyze the Commission into inaction. It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion so to decide."

(B) Evidence of Service Failures

In order to discharge its obligation in this proceeding, the Commission was first required to assess the extent of the public need for the proposed operation. Evidence of such a need, manifested by the inadequacy of the existing service, is clearly illustrated in the testimony of the shippers supporting the application. The first hearing in this proceeding consumed 19 days. 75 witnesses gave 2,886 pages of testimony and introduced 175 exhibits. The bulk of this voluminous record concerns the very item which appellants allege does not exist herein, that is, the inadequacy of the existing service.

In evaluating the evidence supporting the Commission's

decision the lower court noted:

> "We point out that this record shows, with abundant evidence, that a deficiency in service to the shipping public of Nebraska continued for over a period of two years because of transportation refusals, disregard of routings, routings by carrier and rail where no joint truck-rail rates were in existence, more expense to shippers, etc., all because of economic and labor pressure on the transportation companies involved." (R. 236-237) (194 F. Supp. 31, 48)

Forty-four shippers witnesses appeared and testified in support of the application. In addition, seven additional shippers witnesses were present in the hearing room available and willing to testify in support of the application, and it was stipulated that had they been called, their testimony, both direct and cross, would have been substantially the same as numerous of the shippers who had previously testified (R. 51). These public shipper witnesses fall into two natural categories, and their testimony can best be analyzed in that manner.

First, there is the testimony of witnesses Ray Ford, Jack Ford, Phil Katzman and Cecil Chaney. They testified in behalf of business concerns in Omaha, Nebraska, who were refused service by the line-haul unionized carriers. The refusal of the line-haul carriers to provide service to these firms resulted in serious hardship and loss of business to the companies involved since their competitors in the same town were provided with door-to-door service by these same line-haul carriers (R. 47-50).

The testimony of the Ford Company shows that it has been in the warehouse business for a great many years at Omaha, Nebraska. As a general warehouse, it handles all types of merchandise. Shipments are received from many

companies who have plants or distribution points on the routes sought by the applicant. These same commodities are warehoused at Ford until orders are received to ship them out to points in the surrounding states (R. 90-91).

Through years of custom and usage, these Ford customers have authorized the Ford Company, as their agent, to arrange for both inbound and outbound transportation service on these commodities (R. 49). By reason of the development and growth of the motor carrier industry in the last few years, an increasing tonnage has been received by Ford via motor carrier. As the record indicates, this inbound tonnage from points involved herein, averages in excess of a million and a half pounds per month. In the latter part of May, 1956, though there was no dispute or altercation whatsoever between the Ford Company and its employees, the Teamsters Union placed pickets about Ford warehouses in Omaha, Nebraska (R. 49). The pickets remained through the time of the hearing in 1957 (R. 91). During this time, the existing carriers failed and refused to provide motor carrier service to or from the Ford warehouses despite repeated requests for service (R. 91). There has been absolutely no violence in connection with this picket line about the Ford warehouses (R. 108). While Ford has diverted most of its inbound tonnage to rail, this has not been satisfactory since certain of its customers prefer to ship by motor carrier and certain accounts have been lost by this company by reason of the fact that no motor common carrier service is available to it (R. 108).

Other witnesses such as Cecil Chaney, owner and operator of one of the largest sheet metal businesses in Omaha, Phil Katzman, general manager of the Omaha Parlor Frame Company and the Chardon Company, furniture manufacturers, and C. Vincent Jones of the Behlen

Manufacturing Company, Columbus, Nebraska, a large steel fabricating company, testified to substantially similar experiences as the Ford Company (R. 107-108).

These businesses must have adequate motor carrier service in order to survive. Their competitors are provided with door-to-door motor carrier service. It is submitted that the shipping needs of these witnesses alone are sufficient to justify the grant of authority to the applicant.

Into the second category fall a great number of witnesses from smaller communities throughout the State of Nebraska. The failure and refusal of the unionized line-haul carriers to interchange traffic at Omaha, Lincoln, or Grand Island, Nebraska, with non-union short-line carriers, had a devastating effect upon the motor carrier service to small Nebraska towns. Nebraska, perhaps more so than any other state, is dependent upon a system of transportation which will provide it with manufactured commodities, articles and supplies necessary to the effective conduct of the agricultural and stock growing industry, which is the primary source of livelihood in the state. In addition it is necessary that a myriad of supplies and commodities used in daily living be transported daily to points in the state.

When the existing carriers refused to interchange traffic with the non-union short-line carriers serving these communities, the free flow of commerce was impeded and almost stopped in certain instances. Badly needed shipments were delayed for several days, even weeks, in transit. Wholly without authorization, appellants and other unionized carriers diverted interstate shipments to rail carriers, with resulting delays, increased costs and serious inconveniences to the consignees involved (R. 107). Specific routing orders to use short-line carriers were entirely

disregarded, making it extremely difficult to receive emergency or rush order shipments. Complaints and demands for service have been made to both the short-line and the line-haul carriers. Shipments of drugs, medicines, polio vaccines and other such items, vital and necessary to the public health and welfare have been delayed in transit, diverted to rail without protection against heat or cold, shipped via irregular or sporadic service given by some cattle hauler in cattle trucks (R. 107) (See generally R. 29-47). The testimony of these shipper witnesses is voluminous and it convincingly proves a substantial public need and demand for the service of the applicant-appellee, so that there will be a reliable and competent motor common carrier, who will conduct proper interchange of freight with short-line non-union carriers in this state.

While they were not public shipper witnesses, the testimony of the various short-line carriers, stockholders of the applicant, is important to a determination of the issue since it demonstrates the basis for the complaints of the shipping public. These stockholders, officers, and directors of the applicant corporation are motor common carriers, and with certain minor exceptions, all of them operate between points in Nebraska, and are in fact "short-line carriers". Nearly all of them operate scheduled service between Omaha, Nebraska, and a variable number of destination points in this state. In the aggregate, they serve well over two hundred Nebraska communities.

All of the stockholders have certificates from the Nebraska State Railway Commission. Approximately half of them hold interstate certificates, authorizing substantially the same kind and type of operations in interstate commerce and the balance have registered their interstate certificates under the second proviso of Sec. 206 (a), of the

Interstate Commerce Act, (49 U. S. S. 306 (a)) thereby enabling them to handle interstate traffic over their respective routes (R. 102). There are several points served by these twelve stockholders which are not served by any other motor common carrier or by any rail carrier (R. 23).

The record is clear, that with the exception of Clark Bros., there has never been any controversy between any of these carriers and their respective employees (R. 29; 104) There has never been a picket line established at or near any of their terminals, except the Omaha terminal of Clark (R. 104). With one exception there has never been any cancellation of any tariff concurrence or any indication to the public that the through rates and t' ough routing published in tariffs, in which both these stockholder carriers and the carrier-appellants and other line-haul unionized carriers participate, would not be honored (R. 29). The shipping public is entitled to rely upon the tariff publications and routings contained therein.

With absolutely no indication to the shipping public or to the short-line carrier involved; in May of 1956, several of the short-line carriers were refused interchange service at Omaha, Nebraska, by the line-haul unionized carriers (R. 103). The only excuse given by the management of the carrier-appellants was that the Teamsters Union had declared such short-line carriers to be on the "unfair list" (R. 103). The non-union short-line carriers continued to provide regular route scheduled service to the points they were authorized to serve, handling almost entirely intrastate traffic. Repeated attempts to restore normal interchange connections with unionized carriers at Omaha, Lincoln, or Grand Island, Nebraska, proved to be of no avail.

(C) Evaluation of Complete Transportation Picture

In spite of the voluminous evidence of the inadequacy of the existing service, appellants challenge the Commission's decision on the ground that the Commission failed to consider the fact that not all the existing carriers refused at all times to provide the service which they were authorized and required to render. It is patent however, that the Commission, in its Report and Order, did consider the overall transportation situation in the State of Nebraska in light of the existing motor carrier service available. For example, the Commission noted:

> "At no time has the boycott against the stockholder-carriers been completely effective in that at no time has interchange with the larger unionized carriers been completely shut off. For example, Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company, which are rail subsidiaries, appear to have accepted interline traffic from the stockholder-carriers more or less regularly when offered and to have generally maintained normal interline relationships with them. Certain other of the larger unionized carriers have accepted interline freight at times and refused at other times. Most outbound interline traffic appears to have been disposed of by the stockholder-carriers eventually, but the uncertainty of the situation has resulted in considerable harassment to the carriers and substantial delays in the movement of the freight. On inbound traffic, shipper routing instructions have been generally ignored, and much of the interline business previously enjoyed by certain of the stockholder-carriers has been lost. Inbound traffic normally turned over to the stockholder-carriers for ultimate delivery to points on their lines has been turned over to the railroads and nonscheduled motor carriers with resultant delays in delivery inconvenience, and added expense to shippers. The latter stems from the fact there are no joint rates published for motor-rail movements through Omaha. On the

other hand. the stockholder-carriers and the larger unionized motor carriers serving Omaha participate in tariffs naming through routes and joint rates on all motor traffic moving to and from Nebraska points through Omaha." (R. 104-105) (79 M. C. C. 599, 603).

In addition the Commission recognized and adopted the findings of the hearing examiners which included this statement by Examiner Driscoll in his Report and Recommended Order.

"9.—It should be stated that the attitudes and interchange practices of the truck line carriers were not uniform. Some carriers were more liberal than others and the practices varied from almost free and open interchanges to very difficult interchanges. For instance, there is no doubt that some carriers, like Burlington Truck and Santa Fe Trail accepted almost all traffic offered. *But even those carriers did not maintain the same free and open interchange practices in effect before May* 1956." (R. 82) (Emphasis supplied.)

The lower court recognized the fact that the Commission had, indeed, considered the available transportation service when it pointed out:

"The plaintiffs argue that since Burlington and Santa Fe generally maintained normal interline relations during the period in question, and since some of the other plaintiff carriers accepted interline traffic at times, the Commission was not warranted in granting a certificate to the applicant. Although the Commission, in its report of June 1, 1959, in this proceeding (79 M. C. C. 599) took note of these facts, it nevertheless found that the public convenience and necessity required the operation of the applicant. Therefore, the Commission, in reaching its conclusions, took into consideration such service as those carriers continued to render during the period involved, but after weighing the evidence approved the application." (R. 237) (194 F. Supp. 31, 49)

The district court recognized that consideration of the weight and value of the evidence and the inferences to be drawn therefrom are matters for the Commission alone to decide. As this Court pointed out in *Virginian Ry. v. United States*, 272 U. S. 658, 663, 665-666:

> "* * * To consider the weight of the evidence before the Commission, the soundness of reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province * * *. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it * * *."

The Commission examined an unusual transportation situation in which there was substantial evidence that a large portion of the shipping public was being denied the benefits of adequate motor carrier service. It was required and attempted to alleviate the effect of this service failure by authorizing the operation of an additional common carrier in this area. The appellants now seek to substitute the judgment of this Court for that of the Commission. To do so is to depart from the recognized standards of judicial review of the determinations of administrative bodies as a careful analysis of the reasoning which underlies the appellants' arguments will reveal.

The "recognized standards for the administration of the certificating provisions of the Interstate Commerce Act" which the Commission allegedly ignored are, as recognized by the appellants, set forth in *Pan-American Bus Lines*, 1 M. C. C. 190, 203, as follows:

> "The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this

purpose can or will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest."

The standards established by each of these three tests have been met and surpassed in this proceeding. The public need has been extensively cataloged and reviewed throughout every stage of the proceeding. By their conduct, the existing carriers have demonstrated conclusively that they cannot serve both the shipping public and the union and have capitulated in favor of the latter. Their inability or unwillingness to meet the reasonable demands of the public is apparent. Rather than recognize the duty which their certificates impose, they attempt to evade their responsibilities by urging that the applicant has selected the wrong remedy. Finally, as noted above, where the existing carriers have, to a large extent, voluntarily abandoned a major portion of the shipping public, their protestations of impending harm when another carrier is authorized to attempt to fill the void are not entitled to much weight. The test proposed by the appellants has not been ignored or prostituted by the Commission. Rather it has been applied with absolute fidelity to the obligations imposed upon the Commission by the Interstate Commerce Act, that is to develop a national transportation system adequate to meet the needs of the commerce of the United States. (National Transportation Policy, 49 U. S. C, preceding Sections 1, 301, 901, and 1001).

Where, as here, it is manifest from the Commission's decision that that body was aware of the extent of the service which certain of the appellants continued to provide, a determination that an additional carrier is necessary to satisfy a demonstrated public need is certainly

within both the letter and the spirit of the Commission's authority.

The lower court recognized the fallacy of appellants' argument when it pointed out:

> "* * * We also point out here that plaintiff Burlington Truck Lines, Inc., and certain other transportation companies who continued to interchange and accept freight from the Nebraska Carriers, will not be affected by this order. Their business has continued, but because of the fact, either that their transportation facilities were unable to solve the problem when considered in the over-all picture, or because of the refusal of many other transportation companies to render the required service, caused the conditions to exist, is a matter for the Commission in its discretion, to decide. These carriers have interchanged freight from and to Nebraska points during the entire period that applicant has served under its limited temporary authority, and it is reasonable to assume that such interchange will continue in the future. If it does not continue, and even though the resulting competition causes a decrease in revenue to some of the transportation companies, the privilege granted to operate truck lines is in no sense the grant of a monopoly. This is particularly emphasized under Section 207 (b) (49 U. S. C. 307 (b,,, which provides in substance that any certificate issued shall not confer any proprietary or property rights in the use of the public highways. There is no immunity against future competition. The record shows that the Commission considered the nature of the service rendered by plaintiff and Santa Fe during the period." (R. 236-237). (194 F. Supp. 31, 48-49).

The validity of appellants' arguments is further emphasized by the fact that, although it is alleged that certain carriers are being "penalized" by the Commission's order, there is no indication anywhere in the record that the ex-

isting carriers, including the appellants, lost any traffic whatsoever during the period of Nebraska Short Line's operation under temporary authority. By the time of the second hearing "rather substantial" operations had been conducted under the temporary authority (R. 84). In spite of this fact not one of the protesting carriers offered any evidence that they had lost traffic to Nebraska Short Line which they would otherwise have enjoyed. The silence of the record in this regard stands in striking contrast to the unsubstantiated "fears" of the protesting carriers that they will be harmed by the institution of operations by the applicant. In any event, the "loss" of traffic which the appellants were steadfastly refusing to move does not appear to be in the nature of a penalty.

(D) Service Failures Justify Grant of Permanent Authority

The appellants' attempt to minimize the situation which prompted the filing of the application by alleging that the service interruptions were "temporary" and that the restoration of service could have been accomplished in other ways.

The Commission considered both of these arguments and, after giving them the consideration which they merit, dismissed them. In its Report the Commission noted that:

> "* * * in the instant proceeding such difficulties were of more recent origin and were continuing to be experienced up to and including the time of the hearing. Such distinction, we believe is important, because of the use of the term 'present or future public convenience and necessity' in Section 207 of the Act, under which the applications were filed." (R. 118) (79 M. C. C. 599, 613).

This conclusion is fully justified by the record in this

proceeding. The district court, in rejecting a similar argument, pointed out:

> "Section 207 of the Interstate Commerce Act, directs the Commission, in determining applications for motor carrier certificates of public convenience and necessity, to consider both the present and future public convenience and necessity. In hearing and determining such applications, the Commission often finds that coincident with the filing of an application, existing motor carriers start to provide or offer to provide better service to more shippers. Obviously, the Commission is not required to give decisive weight to such a belated zeal to serve the public. Similarly, where existing carriers have gone so far as to subordinate their statutory common carrier service obligations to 'hot cargo' clauses, the Commission, in determining the present and future public convenience and necessity, is not required to give controlling weight to a belated cessation of such conduct. It is equally obvious that in determining the public need for service between such major centers as Omaha, on the one hand, and Chicago, St. Louis and Kansas City, the fact that some of the existing carriers provided some of the needed service does not preclude authorization of additional service to insure continuous and sufficient service for all shippers * * * Congress did not require the Commission to assume that demonstrated recent service inadequacies will not recur; otherwise the belated service zeal of existing carriers could almost always prevent authorization of new and additional service." (R. 246) (194 F. Supp. 31, 54)

There is no question that the public suffered from a lack of adequate motor carrier service and that these service deficiencies continued through the time of the hearing in this proceeding (R. 118). One of the bases upon which the appellants allege that the interline difficulties were of a temporary nature was summarized by Examiner Driscoll in this Report and Recommended Order as follows:

> "For business reasons, which need not be explored, some of the principal Omaha carriers, like Watson Bros., Prucka Transportation, and Independent Truckers, declared that a new policy had been adopted about April 3, 1957. That management policy is to the effect that serious and presistent attempts will be made to interchange freely and normally with all eastern Nebraska carriers." (R. 94)

The decision of the Commission is now being challenged for failing to accept these self-serving declarations as a substitute for the service which these carriers have failed to provide. This tacit admission of the inadequacy of the existing service speaks with great eloquence of the validity of the Commission's determination in this proceeding. It cannot be seriously contended that this "management policy", allegedly put into effect some ten months after the original application was filed, is sufficient to eliminate the economic and commercial distress occasioned by a period of continuing service failure. Even if the "policy" were to have the effect which its instigators allege, the Commission was wholly justified in refusing to believe that this policy would not be withdrawn as soon as it had served its evident purpose. In determining how to accommodate the future public convenience and necessity the Commission can judge best by examining past conduct. In this proceeding such a retrospective view fully justifies the prospective implications of the Commission's decision. Carriers who have so lightly regarded the obligations imposed upon them by their certificates leave the Commission no alternative but to authorize a new carrier, pledged to overcoming just such service failures.

II.

The use of the certificating provisions of Section 207 (a) of the Interstate Commerce Act is proper where the shipping public has been subjected to continuing unexcused service failures at the hands of existing carriers.

Appellants allege that this proceeding cannot be separated from certain labor overtones, but only in the sense that a boycott imposed by the line-haul carriers and a labor union occasioned the service failures which required the filing of the application in question. The issue here is not the validity of the position adopted by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its affiliates. The only issue presented to the Commission was whether the service deficiencies which existed in the state of Nebraska during the period in question justified the authorization of additional comm n carrier operations in the area. As the Commission, in its Report and Order (79 M. C. C. 599) pointed out:

> "We desire to make it unmistakably clear that we are not attempting to adjudicate any labor dispute or controversy. Agreements between carriers and labor organizations affecting labor relations between employers and their employees are matters which Congress has seen fit to entrust to the supervision of the National Labor Relations Board; and we lack the jurisdiction to consider the legality or propriety of such agreements. We are vitally concerned, however, with the actions of common carriers in relation to their obligations to the public under the terms of the Interstate Commerce Act." (R. 115) (79 M. C. C. 599, 611).

As noted above, the evidence of service failures and their attendant repercussions is substantial. Of course the Commission could not close its eyes to facts that appeared time after time in the record. But to say that the Com-

mission was aware of a service failure, and more particularly, aware of the devastating effects of that failure, is not to say that the Commission has attempted to resolve issues outside its field of special competence.

(A) Obligations of Common Carriers

Whatever the rights and duties of employers under the Labor Act, when those employers are also common carriers under certificates issued by the Interstate Commerce Commission, certain obligations of public service are imposed upon them.

Among these is the obligation to accept and transport all freight offered to them in accordance with the provisions of their published tariffs. *Montgomery Ward & Co. v. Northern Pacific Term. Co.*, 129 F. Supp. 475. This duty is almost an absolute one; and, if the public is to be adequately protected, common carriers must be held strictly accountable for its performance. *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.*, 73 M. C. C. 617, 628; *Pacific Gamble Robinson Co. v. Minneapolis & St. Louis Ry. Co.*, 105 F. Supp. 794, modified 215 F.2d 126.

The extent of this obligation is illustrated by the decision in *Montgomery Ward & Co. v. Northern Pacific Term. Co.*, 128 F. Supp. 475, in which Chief Judge Fee traced the common law history of carriers and their duties and responsibilities in a case growing out of the refusal of carriers to cross picket lines established by the unionized employees of the shipper. The court stated at page 493:

> "Thus one of the foundation stones of progress here has been the adoption of the common law, including this absolute obligation placed on common carriers of goods in the public interest. Developed in the darkness of the middle ages in a feudal society, when the cart was the usual means of conveyance over 'traces'

bogged with rain and at times impassable in snow, where the carter was liable to be levied upon by outlaw baron and plundered by fantastic 'road agents,' the status created in the public interest, with its indifference to saint or sinner, official or tradesman, has survived in modern law because of its equality of treatment to all who offered goods for carriage for a specified consideration between specified points in accordance with the holding out of the carrier. While the carrier might limit the holding out quite narrowly as to detail, in the public interest the obligation to serve each upon equal terms without discrimination is vital. So it has remained."

The Court further noted at page 494:

"This basic assumption also controlled the growth of the great carrier system, railroad and motor, in this country. Therefore, the economic power of the United States is based upon these obligations of common carriers. The commerce clause of the constitution was adopted in the light of their importance. The suggestion that these obligations have been abrogated or essentially modified by statute law or policy is unthinkable. In the preservation of these obligations, the public at large—not any class or clique—is vitally concerned. Indeed, the nation will not long survive their destruction."

In delineating the extent of this obligation the Court stated in a subsequent opinion, 128 F. Supp. 520, 521-522:

"Each common carrier, whether trucker or railroad, has a duty at common law and under the Interstate Commerce Act, 49 U. S. C. A. Sec. 1, et seq., to receive, transport, and deliver goods in accordance with its holding out for the engagement of its posted tariff. This duty is almost absolute, since the carrier is excused only when the performance is prevented by the Act of God or the public enemy."

In *Planters Nut and Chocolate Co. v. American Transfer*

Co., 31 M. C. C. 719, the Interstate Commerce Commission had occasion to examine and define the duty of unionized carriers to interchange freight with non-union carriers. In that case, the Commission found that the unionized carriers had been derelict in the performance of their obligations and pointed out:

> "Common carriers by motor vehicle are obligated to accept and transport all freight offered to them in accordance with the provisions of their tariffs. The refusal of group-two carriers to accept and transport complainants' freight tendered to them by Rutherford and the group-one carrier was and is unlawful. If the group-two carriers desired to continue to serve the public as common carriers, they should serve all of the public including complainants."

As far as the administration of the Interstate Commerce Act is concerned, the reasons for service failures are immaterial absent an Act of God or the public enemy which justifies such conduct. No such justification is present here. As the Commission pointed out:

> "There is nothing in this record to indicate any such violence or imminent threats thereof which might have constituted the likelihood of danger to the carriers' employees or equipment or any other circumstances which rendered the operation of the carriers' vehicles impossible." (R. 116) (79 M. C. C. 599, 612).

To argue that the Commission is attempting to adjudicate a labor dispute when it finds that the existing service is inadequate due to the repeated failures of the existing carriers to meet their service obligations is to argue that the Commission is powerless to remedy demonstrated inadequacies in the national transportation system. The Act is not so narrowly drawn.

In this regard it should be noted that the only stock-

holder carrier which was involved in any type of labor dispute. Clark Bros. Transfer, pursued its remedies before the National Labor Relations Board, and the federal courts without achieving any permanent or long range relief for itself or the public which it serves.

As Examiner Driscoll pointed out in his Report and Recommended Order:

> "After some labor negotiations, which need not be recited, four driver employees left the Clark organization at Omaha on September 14, 1955, and picketing of the Clark Omaha Terminal immediately followed. As a result, interchange business with Omaha trunkline carriers fell to almost nothing. Clark's attorneys soon thereafter took that problem up with the National Labor Relations Board. There were several resulting proceedings before that Board and before Federal Courts. Despite all that, these matters have never been completely settled, at least to the satisfaction of Clark. A contempt citation is still pending before the Court, and the Clark terminal is still being picketed." (R. 88).

At the time of the commencement of the second hearing, April 4, 1957 (R. 78), nearly seventeen months since the first breakdown of interchange relationships, Clark still had not been able to restore normal interlining despite his efforts through the N.L.R.B. (R. 88). The injunctive relief obtained under the Labor Act has not proven sufficient to restore normal interline relationships.

(B) The Existence of Alternative Remedies

In addition to arguing that the difficulties herein may be solved only by a resort to the National Labor Relations Board, the appellants also utilize the labor aspects of this proceeding to advance another novel proposition. It is argued that since the service inadequacies which prompted

the filing of this application were the result of a boycott, the Commission is not free to employ the certificating provisions of Section 207 (a) but should have required the aggrieved public to resort to a complaint proceeding under other sections of the Act.

It is not clear why this proceeding should be treated any differently than any other application brought under Section 207 (a). The Commission has imposed the same burden on the applicant; the unmet needs of the shipping public are at least as equally well demonstrated as in any other proceeding; and the failure of the existing carriers to provide the necessary service is perhaps more fully demonstrated herein than in the average 207 (a) proceeding. In spite of this, the appellants continue to urge that some other remedy is more appropriate in this particular proceeding.

In *Davison Transfer & Storage Co. v. United States*, 42 F. Supp. 215, 219, aff'd per curiam 317 U. S. 587, rehearing denied, 317 U. S. 707, the court reasoned:

> "In the case at bar the Commission has found that the services of an additional carrier are required over the routes designated in order that the public may have adequate service. It made no finding that any of the protestant carriers were derelict in their duties, but even if the Commission had made such a finding we would not conclude that the Commission was thereby prohibited from authorizing an additional, and, if need be, a competiting carrier to operate in the field. We think that one of the weapons in the Commission's arsenal is the right to authorize competition where it is necessary in order to compel adequate service and there is nothing in any of the sections cited or in their legislature history that would require a contrary conclusion. The conception that the public must wait while the Commission exercises its statutory powers fortified by orders of court, to

compel existing carriers to do what they should do is one which does not commend itself to common sense and the public interest."

There is nothing in the nature of this particular proceeding which changes this conclusion. Nothing in the Interstate Commerce Act in any way indicates that a section 204 (c) (49 U. S. C. 304 (c)), proceeding is a pre-requisite to an application under section 207 (a). Further the appellants have failed to establish that the Commission would have the power to relegate the parties to a 204 (c) remedy once, as here, the necessary burden under section 207 (a) had been met. The language of section 207 (a) does not lend itself to such a construction since the only burdens to be met are the fitness of the applicant and the fact that the service is or will be required by the present and future public convenience and necessity. Nowhere does the Act specify that the applicant must also show that some other remedy is not more appropriate.

It is submitted that the Commission would be acting beyond the scope of its authority if it were to force the applicant to elect some other remedy where the burden of showing the need for additional authority had been met. The Commission clearly recognized this fact when it pointed out:

> "In a situation such as that here presented, there arises a question as to the proper procedure to secure corrective action. We do not agree with those of the parties who insist that the procedure here adopted, namely, the filing of the instant applications under the provisions of Section 207 of the Act, is in any manner inappropriate. Regardless of the injection of the labor situation into the matter, the instant applications are based upon claimed deficiencies in the motor service available to the shipping public of Nebraska. Where, as here, the existing carriers are shown to have so

conducted their operations as to result in serious inadequacies in the service available to a large section of the public, one effective method of correcting the situation is by the granting of authority for sufficient additional service, and, in fact, we are charged with the duty of procurring such additional facilities as may be necessary to carry out the purposes of the national transportation policy. The fact that other remedies are available, such as the suggested filing of complaints by the aggrieved carriers and shippers does not alter the situation or deprive any carrier of the right to follow the course here chosen." (R. 117) (79 M. C. C. 599, 613).

Although the salutory effect of a 204 (c) complaint is, at best, problematical as indicated by Clark's experience with injunctive relief, the fact remains that the tests under section 207 (a) have been met and the Commission was not only justified but required to authorize the proposed operations. The Commission must be left free to determine, under all of the circumstances, which of the several available remedies will most adequately serve the public interest. Even though the evidence in this proceeding might also be sufficient to warrant relief under some other section of the act, it is submitted that the granting of the application in question will best serve the long-range public interest. The relationship of carrier and shipper is not likely to be satisfactory where one of the parties is operating under the shadow of a court injunction.

Unless the common carriers of this country are to be free to abandon their obligations to the shipping public according to the particular exigencies of the moment the Commission must be able to utilize all of the weapons available to it to insure an adequate nationwide transportation system. If some carriers are damaged by the permanent diversion of the traffic which they voluntarily abandoned, this damage is imminently justifiable in view

of hardships which the conduct of these same carriers visited on the shipping public of the state of Nebraska.

The Commission recognized the existence of the various avenues which the shipping public could follow in attempting to secure the type of transportation service to which they are entitled. With this in mind it was determined that the authorization of an additional carrier would best serve the public interest and was imminently justifiable on the record herein. In arriving at this conclusion the Commission discharged its obligation under the Interstate Commerce Act to weigh the competing factors and, by application of its specialized knowledge of the transportation industry, to determine how the public convenience and necessity can best be served. No basis exists for overturning this determination.

CONCLUSION

The position adopted by the Commission has ample justification both in the record herein and in the principles of law which underlie its decision. The voluntary abrogation of their duties as common carriers by the appellants merely highlights the propriety of the Commission's determination. The elimination of these service failures is the responsibility of the Commission and its determination that an additional carrier should be authorized is within the scope both of its powers and its obligation to the public. It is therefore submitted that the decision of the United States District Court for the Southern District of Illinois should be affirmed.

Respectfully submitted,

J. MAX HARDING,

Counsel for Nebraska Short Line Carriers, Inc.

Proof of Service

I, J. Max Harding, attorney for Nebraska Short Line Carriers, Inc., hereby certify that on the 19 day of September, 1962, I served copies of the foregoing document on all parties of record, as follows:

1. On Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., Appellants, by mailing copies in duly addressed envelopes with air mail postage prepaid to their respective attorneys of record as follows:

To David Axelrod, Jack Goodman, Carl L. Steiner and Arnold L. Burke, 39 South LaSalle Street, Chicago 3, Illinois; to James Gillen and Russell B. James, 547 West Jackson Boulevard, Chicago 6, Illinois; and to Starr Thomas and Roland J. Lehman, 80 East Jackson Boulevard, Chicago 4, Illinois.

2. On General Drivers and Helpers Union, Local 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant, by mailing copies in duly addressed envelopes with first class postage prepaid, to its attorneys of record, as follows: To David D. Weinberg and Arnold J. Stern, 300 Keeline Building, Omaha, Nebraska.

3. On the United States of America, Appellee, by mailing copies in duly addressed envelopes with air mail postage prepaid, to Harlington Wood, Jr., United States Attorney, Federal Building, Peoria, Illinois; to Robert A.

Bicks, Assistant Attorney General, to John H. D. Wigger, Attorney, and to The Solicitor General, Department of Justice, Washington 25, D. C.

4. On the Interstate Commerce Commission, Appellee, by mailing copies in duly addressed envelopes with air mail postage prepaid to Robert W. Ginnane, General Counsel and I. K. Hay, Assistant General Counsel, at the offices of the Commission, Washington 25, D. C.

J. MAX HARDING,

Counsel for Nebraska Short Line Carriers, Inc., Appellee

Address:
Box 2028
Lincoln, Nebraska
Telephone: 477-4106

APPENDIX

Section 207 (a), Interstate Commerce Act, 49 U.S.C. 307 (a)

(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied; Provided, however, that no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.